STATE OF MICHIGAN

COURT OF APPEALS

STANDEX INTERNATIONAL CORPORATION, doing business as Mold-Tech, Plaintiff-Appellant,	UNPUBLISHED March 16, 2004
v	No. 243648 Oakland Circuit Court
BENCH TECH, INC., COMPLETE SURFACE TECHNOLOGIES, INC., and COMPLETE SURFACE TECHNOLOGIES – GRAND RAPIDS, INC., jointly and severally, Defendants-Appellees.	LC No. 99-015841-CK

Before: Owens, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the order denying its motion to hold defendants[1] in contempt. We affirm.

After discovering that defendant Bench Tech was violating a licensing agreement, plaintiff secured both a preliminary and a permanent injunction prohibiting defendants from engaging in any full-texturing[2] or graining business from January 27, 2000 until September 30, 2001. By the terms of the preliminary injunction, defendants were permitted to complete "all full-texturing jobs in progress as of January 27, 2000." Plaintiff initially claimed in their contempt complaint that defendants were in contempt of the preliminary injunction because they

[1] Bench Tech was the original company that entered into a licensing agreement with plaintiff to utilize texture designs owned by plaintiff. Bench Tech subsequently shut down its operations and was replaced by Complete Surface Technologies (CST), an entity, which, in turn, owned the stock of Complete Surface Technologies, Grand Rapids.

[2] The parties disputed the meaning of "full-texturing." Plaintiff contended that it referred to any time a design was etched onto a "tool" or "mold" (the two terms are used interchangeably) used to create plastic parts. Defendants asserted that "full texturing" denoted only the initial time a design was applied to a "tool"; defendants claimed that when an existing design was removed and a new design was applied this process was termed a "repair."

were improperly doing full-texturing work on approximately fifty-seven jobs. The trial court held an extensive evidentiary hearing and concluded that all of the jobs alleged by plaintiff were either in-progress jobs or repair jobs, rather than new full-texturing jobs. Plaintiff now appeals the trial court's decision with respect to only three specific jobs – identified by plaintiff's trial Exhibits 1, 5 and 6 – that were conceded to be full-texturing jobs, but that the trial court determined were properly considered in-progress jobs in compliance with the injunction.

Plaintiff first contends that the trial court erred by misreading the terms of the preliminary and permanent injunctions. Plaintiff argues that the trial court ignored the clear evidence that the Exhibit 1, 5 and 6 jobs were not in progress and were not identified to plaintiff's counsel, and by reading a "same program" exception into the plain language of the injunction. The preliminary injunction permitted defendants to identify any full-texturing jobs that were in progress as of January 27, 2000, and specified that such identified jobs could be completed without violating the injunction.[3] Plaintiff insists that acceptance of defendants' attempts to justify their work on Exhibits 1, 5 and 6 would require this Court to ignore the clear and unambiguous language of the injunction. Plaintiff further argues that, with respect to the Exhibit 5 and 6 jobs, defendants' varied attempts to validate these jobs amounted to after-the-fact justifications that were not supported by the facts.

"Contempt of court is a willful act, omission, or statement that tends to impair the authority or impede the functioning of a court." *In re Contempt of Robertson,* 209 Mich App 433, 436; 531 NW2d 763 (1995), citing *Pontiac v Grimaldi,* 153 Mich App 212, 215; 395 NW2d 47 (1986). "Courts in Michigan have an inherent and statutory power to punish contempt of court by fine or imprisonment." *In re Contempt of Dudzinski,* 257 Mich App 96, 108; 667 NW2d 68 (2003), citing MCL 600.1701 *et seq.* and *In re Contempt of Auto Club Ins Ass'n,* 243 Mich App 697, 708-709; 624 NW2d 443 (2000). "The power to punish for contempt is awesome and carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown." *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971). This Court reviews a trial court's decision to hold a party in contempt for an abuse of discretion. *In re Contempt of Auto Club Ins Ass'n, supra* at 714. We review questions of law associated with our inquiry de novo. *Id.; In re Contempt of Dudzinski, supra* at 99. Our

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[3] Numbered paragraph 3 of the preliminary injunction provided:

> IT IS FURTHER ORDERED that the Defendants may identify, by the customer, job number and copy of purchase orders, if they exist, all full-texturing jobs in progress as of January 27, 2000. Said information must be provided by Defendants to Plaintiff's counsel within fourteen (14) days. Defendants may complete all such jobs so disclosed to Plaintiff's counsel notwithstanding the provisions of this Order on the condition that Defendants do not use or disclose any of the trade secret, confidential information or proprietary information of Mold-Tech in completing such jobs.

Supreme Court, in *Alken-Ziegler v Waterbury Headers Corp*, 461 Mich 219, 227-228; 600 NW2d 638 (1999), described an abuse of discretion as follows:

> An abuse of discretion involves far more than a difference in judicial opinion. *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). It has been said that such abuse occurs only when the result is "'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959), and noting that, although the *Spalding* standard has been often discussed and frequently paraphrased, it has remained essentially intact.
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> This Court historically has cautioned appellate courts not to substitute their judgment in matters falling within the discretion of the trial court, and has insisted upon deference to the trial court in such matters. . . .

In this case, the trial court held an evidentiary hearing that stretched over seventeen days and involved sixteen witnesses. The court issued a lengthy oral opinion that considered each of the alleged violations individually. The court explained, with references to the testimony, why it determined that the injunction had not been violated. Therefore, on its face, the trial court's decision was not arbitrary or capricious, but rather demonstrated a reasoned judgment based on the facts and evidence.

With regard to the Exhibit 1 job, defendants presented evidence that this job involved a so-called "straggler" tool that was part of a customer's project producing truck parts for Freightliner that had already been identified as an in-progress job as required by the preliminary injunction. Several witnesses testified that the Freightliner project was in progress well before the injunction went into effect, that the project was identified to plaintiff's attorney in accordance with the requirements of the preliminary injunction, and that, although it was added on after the injunction was in effect and was not separately identified, the Exhibit 1 job was part of the in-progress project. There was also testimony that defendants' counsel informed plaintiff's counsel that he was reluctant to agree to the entry of the proposed order for a permanent injunction because the Freightliner project had not been completed – although he did not make any reference to the existence of a straggler tool – and plaintiff's attorney indicated in response that defendants could complete that project. The trial court ruled that this correspondence indicated clearly that both sides realized not all of the project was completed. The trial court concluded that plaintiff had failed to demonstrate by a preponderance of the evidence[4] that defendants had committed contempt by completing the Exhibit 1 job.

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[4] The parties dispute whether the correct standard of proof is a preponderance of the evidence or clear and convincing evidence. Compare *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 712; 624 NW2d 443 (2000) (civil contempt need only be proved by a preponderance of the

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Regarding the Exhibit 5 and 6 jobs, plaintiff is correct that defendants' justification for the work on those jobs changed through the course of the evidentiary hearing. The trial court specifically found that the witnesses were credible, even though it recognized that the explanation offered by some witnesses changed during the course of the hearing. We give deference "to the trial court's superior opportunity and ability to judge the credibility of witnesses." *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). As the trial court finally concluded, the general practice in the industry – at least with regard to the smaller companies – was somewhat irregular or slipshod, and it appeared from the witness testimony that the Exhibit 5 and 6 jobs had been in progress at the time of the injunction but had been accidentally misidentified to plaintiff's attorney. The court therefore concluded that the Exhibit 5 and 6 jobs were, in fact, in-progress jobs for which the wrong purchase order number had been mistakenly listed.

The purpose of the injunction was to prevent defendants from undertaking any new full-texturing jobs after January 27, 2000, but not to prevent them from completing in-progress work that was identified to plaintiff's attorney. The trial court concluded that the Exhibit 1, 5 and 6 jobs were in-progress jobs and that, although defendants attempted to identify all the in-progress jobs as required by the preliminary injunction, they made mistakes with respect to the identification of the Exhibit 1, 5 and 6 jobs. The trial court in effect concluded that the evidence established that the failure to identify the jobs by the proper purchase order numbers was essentially a clerical mistake rather than a violation of the injunction. This determination was not "so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Furthermore, given that the contempt power is to be used "judiciously and only when the contempt is clearly and unequivocally shown," *Matish, supra* at 572, it was appropriate for the trial court to discretionarily determine that the mistakes made by defendants in the identification of in-progress full-texturing work did not merit the severe sanctions associated with contempt. Because this Court reviews the trial court's determination for an abuse of discretion, and because there is evidence to support the trial court's discretionary determination, we conclude that plaintiff failed to demonstrate an abuse of the trial court's discretion.

Plaintiff also contends that the trial court was biased against it based on the fact that plaintiff was a much larger company than defendants. Plaintiff bases this claim on the fact that,

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evidence) with *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971) (court may punish for contempt "only when the contempt is clearly and unequivocally shown") and *In re Contempt of Calcutt*, 184 Mich App 749, 757; 458 NW2d 919 (1990) ("the standard of proof is more stringent than in other civil actions: proof of contempt must be clear and unequivocal."). This issue need not be decided in this case, however, because the trial court determined that plaintiff failed to satisfy the more lenient "preponderance of the evidence" standard. Having failed to satisfy that less stringent standard of proof, plaintiff could not hope to satisfy the "clear and convincing" standard.

although the trial court stated that the relative economic size of the parties was irrelevant, the court nevertheless repeatedly referred to this supposedly irrelevant fact during its oral opinion.

Plaintiff did not raise the issue of disqualification in the trial court. MCR 2.003(A). Failure to raise the issue before the trial court by filing a written motion accompanied by an affidavit listing all grounds for disqualification and, if the motion to disqualify is denied, to pursue the issue before the chief judge of the circuit, constitutes a waiver of the issue. *Cain v Dep't of Corrections*, 451 Mich 470, 494; 548 NW2d 210 (1996); *Welch v District Court*, 215 Mich App 253, 258; 545 NW2d 15 (1996). This issue is therefore unpreserved for appellate review.

Even if we were to consider this claim, there is a strong presumption that the trial court is impartial and plaintiff must overcome the heavy burden of showing actual bias. *Cain*, *supra* at 497. Plaintiff must show that the trial court was actually and personally biased against it. *Id.* at 495, citing MCR 2.003(B)(1).

The trial court's references to relative company size in the course of its opinion were not evidence of actual bias or prejudice. Each of the references was made either to explain the background of the litigation, or to explain why, in the court's view, the procedures utilized by defendants might not be as organized or sophisticated as those employed by plaintiff, or why the terminology used by the large and small companies might differ, or why many of defendants' witnesses might have been involved in business with defendants. None of these comments clearly evidenced an actual personal bias against plaintiff and plaintiff has therefore failed to overcome the strong presumption that the trial court was impartial.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Christopher M. Murray